

J-3763



"PATENT APPLICATION"

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AF

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Before the Board of Patent Appeals and Interferences

In re Application of

ANTHONY J. CAFFERATA ET AL

U.S. Serial No. 10/699,335

Group Art Unit 3728

Filed: October 31, 2003

D. Fidei, Examiner

DISPLAY PACKAGE WITH STABILIZING
AND INDEXING MEANS

Racine, Wisconsin
February 4, 2008

Commissioner for Patents
P.O. Box 1450
Alexandria, Virginia 22313-1450

RESPONSE TO NOTIFICATION OF
NON-COMPLIANT APPEAL BRIEF

Dear Sir:

A Notification of Non-Compliant Appeal Brief mailed January 22, 2008 states that the Appeal Brief filed December 19, 2007 does not contain a statement of the status of all claims on appeal. Applicants are submitting herewith an amended appeal brief in response to the Notification.

The defect as noted in the Notification has been corrected as follows:

- (1) The last sentence under the subheading "Status of Claims" has been amended to read "All pending claims 1-4 and 7-16 are currently rejected and are under appeal".

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Accordingly, applicants have addressed the matter set forth in the Notification mailed January 22, 2008. Favorable consideration of the appeal is requested.

Respectfully submitted,

ANTHONY J. CAFFERATA ET AL

By Mary Breiner
Mary J. Breiner, Attorney
Registration No. 33,161
S. C. JOHNSON & SON, INC.
1525 Howe Street
Racine, Wisconsin 53403-2236

Telephone: (703) 684-6885

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BRIEF ON APPEAL

Dear Sir:

This appeal is from the action of the Primary Examiner mailed June 19, 2007 rejecting claims 1-4 and 7-16.

Appellants' brief fee of \$510 was earlier submitted on December 19, 2007. The Commissioner is hereby authorized to charge any additional fees which may be required, or credit any overpayment to Deposit Account No. 02-3690 of the undersigned attorney.

Real Party in Interest

The named inventors of the captioned application have assigned their entire rights to S. C. Johnson & Son, Inc., a corporation organized under the laws of Wisconsin.

Related Appeals and Interferences

No appeal or interference is known to appellants which will directly affect or be directly affected by or have a bearing on the Board's decision in this pending appeal.

Status of Claims

The claims pending in this application are claims 1-4 and 7-16 as set forth in the Appendix hereto. Claims 1, 2, 13 and 14 are the independent claims. Claims 5, 6 and 17-34 have been canceled. All pending claims 1-4 and 7-16 are currently rejected and are under appeal.

Status of Amendments

A timely response was made on August 20, 2007 to the final official action mailed June 19, 2007 wherein no further amendment was made. An Advisory Action was mailed September 5, 2007 stating that the response filed August 20, 2007 does not place the application in condition for allowance.

Summary of Claimed Subject Matter

Independent claims 1, 2, 13 and 14 are described below with reference to pages and paragraphs of the specification.

Independent claim 1 claims a package for containing and displaying at least one article (page 1, lines 7-8) comprising

- a back panel (page 4, line 19), and
- a front panel attached to said back panel (page 4, lines 18-22),
 - wherein said front panel comprises a blister pack formed of plastic (page 8, lines 20-23) and including a first outward projecting portion in a bottom portion of said blister pack and at least one additional outward projecting portion having a depth and shape conforming to at least a portion of said at least one article (page 9, lines 1-3),
 - wherein at least a portion of said first outward projecting portion extends widthwise at least a substantial portion between a first side of said blister pack and a second side of said blister pack (page 5, lines 26-28), and has a depth outward sufficient to allow said package to stand substantially upright (page 4, lines 23-26),
 - wherein said depth of said at least a portion of said first outward projecting portion is equal to a greatest depth of an outermost projecting portion of said at least one additional outward projecting portion so that said package is self-indexing when said package is aligned with one or more packages having a structure of

said package (page 5, lines 8-11 and page 10, line 25 to page 11, line 8); and

wherein said first outward projecting portion includes a bottom wall having integral therein at least two spaced apart downward protrusions (page 5, lines 20-23 and page 10, lines 6-8).

2. A blister pack for a display package for at least one article, said blister pack (page 1, lines 7-8) comprising

a plastic body including a first outward projecting portion in a bottom portion of said body, with at least a portion of said first outward projecting portion extending widthwise at least a substantial portion between a first side of said body and a second side of said body, and said at least a portion of said outward projecting portion having a depth outward sufficient to allow said body to stand substantially upright (page 9, line 25 to page 10, line 6), and

said body further including at least one additional outward projecting portion having a depth and shape conforming to at least a portion of said at least one article (page 9, lines 1-3),

wherein said depth of said at least a portion of said first outward projecting portion is equal to a greatest depth of an outermost projecting portion of said at least one

additional outward projecting portion so that said blister pack is self-indexing when said blister pack is aligned with one or more blister packs having a structure of said blister pack (page 5, lines 8-11 and page 10, line 25 to page 11, line 8); and

wherein said first outward projecting portion includes a bottom wall having integral therein at least two spaced apart downward protrusions (page 5, lines 20-23 and page 10, lines 6-8).

13. A package for containing and displaying at least one article (page 1, lines 7-8) comprising

- a back panel (page 4, line 19), and
- a front panel attached to said back panel (page 4, lines 18-22),
 - wherein said front panel comprises a blister pack formed of plastic and including a first outward projecting portion in a bottom portion of said blister pack and at least one additional outward projecting portion having a depth and shape conforming to at least a portion of said at least one article (page 9, lines 1-3),

wherein at least a portion of said first outward projecting portion extends widthwise at least a substantial portion between a first side of said blister pack and a second side of said blister pack

(page 5, lines 26-28), and has a depth outward sufficient to allow said package to stand substantially upright (page 4, lines 23-26), and wherein a portion of said at least one additional outward projecting portion is equal in depth to a greatest depth in the first outward projecting portion and is at a position in said package to render said package self-indexing when said package is aligned with one or more packages having a structure of said package, and a portion of said depth of said at least one additional outward projecting portion is of lesser depth than the greatest depth in the first outward projecting portion (page 9, line 18 to page 10, line 6); and wherein said first outward projecting portion includes a bottom wall having integral therein at least two spaced apart downward protrusions (page 5, lines 20-23 and page 10, line 25 to page 11, line 8).

14. A blister pack for a display package for at least one article, said blister pack (page 1, lines 7-8) comprising

a plastic body including a first outward projecting portion in a bottom portion of said body, with at least a portion of said first outward projecting portion extending widthwise at least a substantial portion between a first side of said body and a second side of said body, and said at least a portion of said outward

projecting portion having a depth outward sufficient to allow said body to stand substantially upright (page 9, line 25 to page 10, line 6), and said body further including at least one additional outward projecting portion having a depth and shape conforming to at least a portion of said at least one article (page 9, lines 1-3),

wherein a portion of said at least one additional outward projecting portion is equal in depth to a greatest depth in the first outward projecting portion and is at a position in said blister pack to render said blister pack self-indexing when said blister back is aligned with one or more blister packs having a structure of said blister pack, and a portion of said depth of said at least one additional outward projecting portion is of lesser depth than the greatest depth in the first outward projecting portion (page 9, line 18 to page 10, line 6); and wherein said first outward projecting portion includes a bottom wall having integral therein at least two spaced apart downward protrusions (page 5, lines 20-23 and page 10, lines 6-8).

Grounds of Rejection to be Reviewed on Appeal

The grounds of rejection to be reviewed in the present appeal is as follows:

- (1) whether claims 1-4 and 7-14 are patentable under 35 U.S.C. §103(a) over U.S. Patent No. D447,408 (Humphrey) in view of U.S. Patent No. 4,781,289 (Perkins); and
- (2) whether claims 1-4 7-12, 15 and 16 are patentable under 35 U.S.C. §103(a) over U.S. Patent No. D467,494 (Udwin) in view of Perkins and U.S. Patent Application Publication No. 2001/0007308 (Glassman).

Argument

I. The Invention

The invention of the pending claims is directed to packages and blister packs for containing and displaying at least one article structured to allow the packages and blister packs to be free-standing and self-indexing when a plurality of packages or packs are aligned. This is advantageous due to the nature of use of packages and blister packs for display on surfaces, such as store shelves, to maintain a visible and neat display of the article within the package or blister pack, i.e., the package or pack remains upright, and when used with an automated facing device, is able to be moved forward without toppling forward or becoming crushed when another package or pack is removed from the display. Conventional packages or blister packs tend to be unstable causing them to crush

together and/or fall over resulting in a messy display (and thus reduced visibility of the article) or a display in which it is hard to remove a package or pack or to reinsert a package or pack once removed. Thus, a package or pack will not be displayed properly or in good condition resulting in non-consideration of the product by a consumer and thus a missed sale.

Appellants respectfully submit that if the claimed self-indexing structure was so well-developed in the art or obvious to one skilled in the art that an explicit teaching or suggestion thereto would be present in the art.

Appellants further respectfully submit that this is not the case in the present instance as evident when considering the teachings of the applied references as a whole.

II. Rejection under 35 U.S.C. §103(a) of claims 1-4 and 7-14.

Claims 1, 2, 13 and 14 are the independent claims. Claims 1 and 13 claim a package for containing and displaying at least one article. Claims 2 and 14 claim a blister package for at least one article.

Essentially, the Examiner is relying on Humphrey for teaching a support structure with a closed bottom wall with projections therefrom and is relying on Perkins for teaching a depth of a product enclosure which is comparable

to the depth of a support structure. Appellants submit that when the teachings of the references are taken as a whole, e.g., in particular as to the differences between the applied art itself and between the prior art and the claimed subject matter, that no suggestion or motivation is provided to one skilled in the art to modify the prior art structure in a manner to obtain the invention as claimed.

More particularly, Humphrey shows a package design having a base which extends outward a distance beyond the outermost extension of any other portion of the package body. The base would serve to allow the package to stand unaided in an upright position. Humphrey does not disclose a depth of at least a portion of a first outward projecting portion equal to a greatest depth of an outermost projecting portion of an at least one additional outward projecting portion so that the package is self-indexing when the package is aligned with one or more packages having the same structure. Humphrey provides no teaching as to providing a package which is self-indexing. In fact, due to the extension of the base beyond the other portions of the package as shown in Humphrey, the package would not be self-indexing since pressure on the back of the package to push the package forward would continue to push the top portion forward when the base stopped, thus, tipping the top portion of the package forward and causing the package to be out of

alignment with the support surface and other packages. This problem is solved by appellants' invention as claimed.

Perkins does not make up for the shortcomings of Humphrey. Perkins is applied by the Examiner as teaching comparable depths for a product area and a support structure. Perkins discloses a display package adapted to stand alone on a horizontal surface (column 4, lines 9-10). While Perkins states that the depth of the support structure 22 should be comparable to the depth of the product enclosure 20 to prevent the package from falling over, no teaching or suggestion is set forth to provide a bottom portion or foot equal in depth to an additional projecting portion of the package so that the package is self-indexing, i.e., provides predetermined spacing between it and another aligned package (see appellants' specification at page 5, lines 4-6) which is a separate structural feature from providing a package able to stand alone. Perkins does not recognize any problem as to self-indexing or desire to provide a structure which is self-indexing. As to the described ability to stand alone or to take up minimal shelf space, each of these ends can be achieved by a structure as shown in Humphrey wherein the base portion allows the package to stand alone and yet the base portion extends beyond the article portion.

It would not have been obvious to one of ordinary skill in the art to modify Humphrey by constructing the first portion equal to a greatest depth of an outermost projecting portion of the additional outward portion in order to provide a self supporting package while not making the base excessively deep as stated by the Examiner. (See page 3 of the official action).

Further, Perkins does not teach a closed bottom, but rather teaches that the display package 10 is vertically supported by bottom edges 60, 64 and 66 alone (column 3, lines 56-58) and that the openness of the bottom is desirable as providing a convenient place to grasp the blister pack 18 to pull it away from panel 12 to open the package thereby eliminating the need for an auxiliary pull-tab (column 3, lines 65-68). Since neither Perkins nor Humphrey provide any teaching or suggestion as to providing a structure which is self-indexing, appellants respectfully submit that changing the bottom structure and the relationship between the upper portion and lower portion to provide a distinct added function, i.e., self-indexing, is not taught or recognized by Perkins or Humphrey. It would not have been obvious to modify Humphrey, as suggested by the Examiner, by construing the depth of at least a portion of the first outward projecting portion being equal to a greatest depth of an outermost projecting portion of the at

least one additional outward projecting portion. The structure of the invention as claimed provides for self-indexing of the package when the package is aligned with other like packages.

Since neither Humphrey nor Perkins provide any teaching regarding self-indexing, and in view of the differences in structure, i.e., Humphrey teaches a supporting bottom structure extending around a product section and Perkins in the preferred embodiment shown in Figure 3 teaches a product enclosure extending a support base, no motivation is provided to suggest to one skilled in the art to modify the structure of Humphrey or Perkins to obtain appellants' claimed package in the absence of hindsight. The Examiner has previously asserted, inter alia, that "equal is mere extrapolation of the Perkins teachings" and that the "dimensional construction of Perkins is no different than Applicant's self-indexing package alignment" since "Perkins' desire not to use unnecessary valuable shelf-space by leading one skilled in the art to make portions 20 and 22 of equal depth has the effect of creating organized indexed appearance". Appellants respectfully submit that such is mere speculation since there is no basis from the teachings of Perkins for one skilled in the art to modify Perkins to achieve appellants' claimed structure. Perkins does not recognize any problem as to self-indexing or desire to provide a structure which

is self-indexing. As to the described ability to stand alone or to take up minimal shelf space, each of these ends can be achieved by a structure as shown in Humphrey, wherein the base portion allows the package to stand alone and yet the base portion extends beyond the article portion.

Accordingly, Humphrey in combination with Perkins does not render the invention as claimed obvious within the meaning of 35 U.S.C. §103(a).

III. Rejection Under 35 U.S.C. §103(a) of Claims 1-4,
7-12 and 15-16

Claims 1 and 2 are the independent claims. Claim 1 claims a package for containing and displaying at least one article. Claim 2 claims a blister package for at least one article.

Essentially, the Examiner is relying on Udwin for teaching a support structure with a closed bottom wall with projections therefrom, on Perkins for teaching a depth of a product enclosure which is comparable to the depth of a support structure, and on Glassman for teaching two feet on a bottom surface of the packaging.

Udwin discloses a package having a bottom portion which extends outward further than any other portion extending outward, i.e., the bottom portion has a depth greater than the depth of the other outward extending

portion. As such, Udwin does not disclose the depth of an at least a portion of the first outward projecting portion as being equal to a greatest depth of an outermost projecting portion of the at least one additional outward projecting portion so that the package is self-indexing when the package is aligned with one or more packages of like structure.

Udwin is applied in combination with Perkins and Glassman. Perkins does not make up for the shortcomings of Udwin on the same basis as set forth above in section II as to the rejection of claims 1-5 and 7-14 over the combination of Perkins with Humphrey and resubmitted here. Further, Glassman does not make up for the shortcomings of Udwin and Perkins. Glassman discloses a package having a bottom portion which extends outward further than any other portion extending outward, i.e., the bottom portion has a depth greater than the depth of the other outward extending portion. The teaching of feet on the bottom of the package is inadequate to make up for the shortcomings of the other references.

Accordingly, the combination of Udwin, Perkins and Glassman does not render the invention as claimed obvious within the meaning of 35 U.S.C. §103(a).

IV. Supporting Law

The Supreme Court recently stated that "a patent composed of several elements is not proved obvious merely by demonstrating that each of its elements was, independently, known in the prior art." KSR Int'l Co. v. Teleflex Inc., 127 S.Ct. 1727, 1741, 82 USPQ2d 1385 (2007). "[I]t can be important to identify a reason that would have prompted a person of ordinary skill in the relevant field to combine the elements in the way the claimed new invention does." Id. In identifying a "reason," the Court cautioned that "the analysis need not seek out precise teachings [in the prior art] directed to the specific subject matter of the challenged claim." Id. Rather, courts must also "look to the interrelated teachings of multiple patents; the effects of demands known to the design community or present in the marketplace; and the background knowledge possessed by a person having ordinary skill in the art." KSR Int'l, 127 S.Ct. at 1740-41.

Ultimately, however, the analysis must be explicit. In fact, "'[R]ejections on obviousness cannot be sustained by mere conclusory statements; instead there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness.'" KSR Int'l, 127 S.Ct. at 1741, citing In re Kahn, 441 F.3d 977, 988; 78 USPQ2d 1329 (Fed. Cir. 2006).

A rejection under 35 U.S.C. §103 clearly, therefore, must rest on a firm factual basis and that the Examiner has the initial duty of providing that factual basis. Deficiencies in the factual basis cannot be supplied by resorting to speculation or unsupported generalities. In re Warner, 379 F.2d 1011, 154 USPQ 173 (CCPA 1967) and In re Freed, 425 F.2d 785, 165 USPQ 570 (CCPA 1970).

Further, the mere fact that the prior art can be modified does not make the modification obvious unless the prior art suggests the desirability of the modification. In re Gordon, 733 F.2d 900, 902; 221 USPQ 1125 (Fed. Cir. 1984). Once applicants' solution to a problem is disclosed, it is easy to see how prior references can be modified and manipulated to produce the claimed invention. The change can appear simple and by hindsight seem obvious. However, as stated by the Court in In re Sporck, 133 USPQ 360, 363 (CCPA 1962), the simplicity of new inventions is oftentimes the very thing that is not obvious before they are made. The Court goes on to cite as support In re Osplack, 195 F.2d 921, 93 USPQ 306, 308 (CCPA 1952) stating -

"We think this case is one of that category of inventions which, when viewed after disclosure and explanation by an applicant, seem simple and such as

should have been obvious to those in the field. Yet this does not necessarily negative invention or patentability. [citations omitted]. Indeed, simplicity may even be some evidence of invention. [citations omitted]."

Conclusion

It is respectfully submitted that appealed claims 1-4 and 7-16 are patentable within the meaning of 35 U.S.C. §103. Reversal of the Examiner's rejections is, therefore, respectfully urged.

Respectfully submitted,

ANTHONY J. CAFFERATA ET AL

By 
Mary J. Breiner, Attorney
Registration No. 33,161
S. C. JOHNSON & SON, INC.
1525 Howe Street
Racine, Wisconsin 53403-2236

Telephone: (703) 684-6885

Attachments - Claims Appendix
- Evidence Appendix
- Related Proceedings Appendix

TheAppealed Claims:

1. A package for containing and displaying at least one article comprising
 - a back panel, and
 - a front panel attached to said back panel,
 - wherein said front panel comprises a blister pack formed of plastic and including a first outward projecting portion in a bottom portion of said blister pack and at least one additional outward projecting portion having a depth and shape conforming to at least a portion of said at least one article,
- wherein at least a portion of said first outward projecting portion extends widthwise at least a substantial portion between a first side of said blister pack and a second side of said blister pack, and has a depth outward sufficient to allow said package to stand substantially upright,
- wherein said depth of said at least a portion of said first outward projecting portion is equal to a greatest depth of an outermost projecting portion of said at

least one additional outward projecting portion so that said package is self-indexing when said package is aligned with one or more packages having a structure of said package; and

wherein said first outward projecting portion includes a bottom wall having integral therein at least two spaced apart downward protrusions.

2. A blister pack for a display package for at least one article, said blister pack comprising a plastic body including a first outward projecting portion in a bottom portion of said body, with at least a portion of said first outward projecting portion extending widthwise at least a substantial portion between a first side of said body and a second side of said body, and said at least a portion of said outward projecting portion having a depth outward sufficient to allow said body to stand substantially upright, and said body further including at least one additional outward projecting portion having a depth and shape conforming to at least a portion of said at least one article,

wherein said depth of said at least a portion of said first outward projecting portion is equal to a greatest depth of an outermost projecting portion of said at least one additional outward projecting portion so that said blister pack is self-indexing when said blister pack is aligned with one or more blister packs having a structure of said blister pack; and

wherein said first outward projecting portion includes a bottom wall having integral therein at least two spaced apart downward protrusions.

3. A package according to claim 1 wherein said at least one additional outward projecting portion is continuous with said first outward projecting portion.

4. A blister pack according to claim 2 wherein said at least one additional outward projecting portion is continuous with said first outward projecting portion.

7. A package according to claim 1 wherein said first outward projecting portion includes a front wall of uniform depth or non-uniform depth.

8. A blister pack according to claim 2 wherein said first outward projecting portion includes a front wall of uniform depth or non-uniform depth.

9. A package according to claim 7 wherein one of said portions of non-uniform depth is a wall of one of said at least one additional outward projecting portion.

10. A blister pack according to claim 8 wherein one of said portions of non-uniform depth is a wall of one of said at least one additional outward projecting portion.

11. A package according to claim 1 wherein said first outward projecting portion is substantially rectangular.

12. A blister pack according to claim 2 wherein said first outward projecting portion is substantially rectangular.

13. A package for containing and displaying at least one article comprising

- a back panel, and
- a front panel attached to said back panel,
- wherein said front panel comprises a blister pack formed of plastic and including a first outward projecting portion in a bottom portion of said blister pack and at least one additional outward projecting

portion having a depth and shape conforming to at least a portion of said at least one article,

wherein at least a portion of said first outward projecting portion extends widthwise at least a substantial portion between a first side of said blister pack and a second side of said blister pack, and has a depth outward sufficient to allow said package to stand substantially upright, and

wherein a portion of said at least one additional outward projecting portion is equal in depth to a greatest depth in the first outward projecting portion and is at a position in said package to render said package self-indexing when said package is aligned with one or more packages having a structure of said package, and a portion of said depth of said at least one additional outward projecting portion is of lesser depth than the greatest depth in the first outward projecting portion; and

wherein said first outward projecting portion includes a bottom wall having integral therein at least two spaced apart downward protrusions.

14. A blister pack for a display package for at least one article, said blister pack comprising

a plastic body including a first outward projecting portion in a bottom portion of said body, with at least a portion of said first outward projecting portion extending widthwise at least a substantial portion between a first side of said body and a second side of said body, and said at least a portion of said outward projecting portion having a depth outward sufficient to allow said body to stand substantially upright, and said body further including at least one additional outward projecting portion having a depth and shape conforming to at least a portion of said at least one article,

wherein a portion of said at least one additional outward projecting portion is equal in depth to a greatest depth in the first outward projecting portion and is at a position in said blister pack to render said blister pack self-indexing when said blister back is aligned with one or more blister packs having a structure of said blister pack, and a portion of said depth of said at least one additional outward

projecting portion is of lesser depth than the greatest depth in the first outward projecting portion; and

wherein said first outward projecting portion includes a bottom wall having integral therein at least two spaced apart downward protrusions.

15. A package according to claim 1 wherein two of said at least one additional outward projecting portions are present wherein said two of said at least two additional outward projecting portions are of different depths from each other.

16. A blister pack according to claim 2 wherein two of said at least one additional outward projecting portions are present wherein said two of said at least two additional outward projecting portions are of different depths from each other.

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A P P E N D I X

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R E L A T E D
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